90-1816

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

MSM FARMS, INC., a Nebraska Corporation,

Petitioner,

vs.

ROBERT M. SPIRE, Attorney General,

Respondent.

and

EVERETT HOLSTEIN and RICHARD BARTEK,

Intervenors

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether Article XII section 8 of the Nebraska Constitution deprives the Plaintiff of the Equal Protection of the Law as guaranteed by the Fourteenth Amendment of the United States Constitution?

II. Whether Article XII section 8 of the Nebraska Constitution contravenes the Due Process and Taking clauses of the Fourteenth Amendment to the United States Constitution in so far as it provides for escheat of property without payment to the owner?

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

MSM Farms, Inc., Petitioner and Plaintiff below.

The Respondents and defendants below are:

Robert M. Spire, Attorney General
for the State of Nebraska

The Intervenors and defendants below are:

Everett Holstein
Richard Bartek

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OPINIONS BELOW

The opinion of the court of appeals (App. 1) is reported at 927 F.2d 330 (Feb. 27, 1991). The opinion of the district court (App. 12) is not reported.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on February 27th 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution provides in relevant part that:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Article XII section 8 of the Nebraska Constitution provides in relevant part that:

That Article XII of the Constitution of the State of Nebraska be amended by adding a new section numbered 8 and subsections as numbered, notwithstanding any other provisions of this Constitution.

(1) No corporation or syndicate shall acquire, or otherwise obtain an interest, whether legal, beneficial, or otherwise, in any title to real estate used for farming or ranching in this state, or engage in farming or ranching.

Corporation shall mean any corporation organized under the laws of any state of the United States or any country or any partnership of which such corporation is a partner.

Farming or ranching shall mean (i) the cultivation of land for the production of agricultural crops, fruit, or other horticultural products, or (ii) the ownership, keeping or feeding of animals for the production of livestock or livestock products.

Syndicate shall mean any limited partnership organized under the laws of any state of the United States or any country, other than limited partnerships in which the partners are members of a family, or a trust created for the benefit of a member of that family, related to one another within the fourth degree of kindred according to the rules of civil law, or their spouses, at least one of whom is a person residing on or actively engaged in the day to day labor and management of the farm or ranch, and none of whom are nonresident aliens. This shall not include general partnerships.

These restrictions shall not apply to:

(A) A family farm or ranch corporation. Family farm or ranch corporation shall mean a corporation engaged in farming or ranching or the ownership of agricultural land, in which the majority of the voting stock is held by members of a family, or a trust created for the benefit of a member of that family, related to one another within the fourth degree of kindred according to the rules of civil law, or their spouses, at lease one of whom is a person residing on or actively engaged in the day to day labor and management of the farm or ranch and none of whose stockholders are non-resident aliens and none of whose stockholders are corporations or partnerships, unless all of the stockholders or partners of such entities are persons related within the fourth degree

of kindred to the majority of stockholders in the family farm corporation.

These restrictions shall not apply to:

(B) Non-profit corporations.

These restrictions shall not apply to:

(C) Nebraska Indian tribal corporations.

These restrictions shall not apply to:

(D) Agricultural land, which, as of the effective date of this Act, is being farmed or ranched, or which is owned or leased, or in which there is a legal or beneficial interest in title directly or indirectly owned, acquired, or obtained by a corporation or syndicate, so long as such land or other interest in title shall be held in continuous ownership or under continuous lease by the same such corporation or syndicate, and including such additional ownership or leasehold as is reasonably necessary to meet the requirements of pollution control regulations. For the purposes of this exemption, land purchased on a contract signed as of the effective date of this amendment, shall be considered as owned on the effective date of this amendment.

These restrictions shall not apply to:

(E) A farm or ranch operated for research or experimental purposes, if any commercial sales from such farm or ranch are only incidental to the research or experimental objectives of the corporation or syndicate.

These restrictions shall not apply to:

(F) Agricultural land operated by a corporation for the purpose of raising poultry.

These restrictions shall not apply to:

(G) Land leased by alfalfa processors for the production of alfalfa.

These restrictions shall not apply to:

(H) Agricultural land operated for the purpose of growing seed, nursery plants, or sod.

These restrictions shall not apply to:

(I) Mineral rights on agricultural land.

These restrictions shall not apply to:

(J) Agricultural land acquired or leased by a corporation or syndicate for immediate or potential use for nonfarming or nonranching purposes. A corporation or syndicate may hold such agricultural land in such acreage as may be necessary to its nonfarm of nonranch business operation, but pending the development of such agricultural land for nonfarm or nonranch purposes, not to exceed a period of five years, such land may not be used for farming or ranching except under lease to a family farm or ranch corporation or a non-syndicate and non-corporate farm or ranch.

These restrictions shall not apply to:

(K) Agricultural lands or livestock acquired by a corporation or syndicate by process of law in the collection of debts, or by any procedures for the enforcement of

a lien, encumbrance, or claim thereon, whether created by mortgage or otherwise. Any lands so acquired shall be disposed of within a period of five years and shall not be used for farming or ranching prior to being disposed of except under a lease to a family farm or ranch corporation or a non-syndicate and non-corporate farm or ranch.

These restrictions shall not apply to:

(L) A bona fide encumbrance taken for purposes of security.

These restrictions shall not apply to:

(M) Custom spraying, fertilizing, or harvesting.

These restrictions shall not apply to:

(N) Livestock futures contracts, livestock purchased for slaughter, or livestock purchased and resold within two weeks.

If a family farm corporation, which has qualified under all the requirements of a family farm or ranch corporation, ceases to meet the defined criteria, it shall have fifty years, if the ownership of the majority of the stock of such corporation continues to be held by person related to one another within the fourth degree of kindred or their spouses, and their landholdings are not increased, to either requalify as a family farm corporation or dissolve and return to personal ownership.

The Secretary of State shall monitor corporate and syndicate agricultural land purchases and corporate and syndicate farming and ranching operations, and notify the Attorney General or any possible violations. If the Attorney General has reason to believe that a corporation or syndicate is violating this amendment, he or she shall

commence an action in district court to enjoin any pending illegal land purchase, or livestock operation, or to force divestiture of land held in violation of this amendment. The court shall order any land held in violation of this amendment to be divested within two years. If land so ordered by the court has not been divested within two years, the court shall declare the land escheated to the State of Nebraska.

If the Secretary of State or Attorney General fails to perform his or her duties as directed by this amendment. Nebraska citizens and entities shall have standing in district court to seek enforcement.

The Nebraska Legislature may enact, by general law, further restrictions prohibiting certain agricultural operations that the legislature deems contrary to the intent of this section. (Adopted, 1982 by Initiative Petition #300.)

STATEMENT OF THE CASE

This is an action for declaratory judgment commenced by the Plaintiff corporation against the Attorney General of Nebraska. The jurisdiction of the District Court for the District of Nebraska was based upon 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 2201 (declaratory judgment) and the Fourteenth Amendment to the Constitution of the United States.

The petition sought a declaration that Article XII section 8 of the Nebraska Constitution which was adopted by the initiative of the voters is unconstitutional as being in violation of the Fourteenth Amendment to the

United States Constitution, and a temporary and permanent injunction against enforcement.

The Attorney General first asserted that no case or controversy existed in that the plaintiff was a sham and without real substance and moved for summary judgment. That motion was denied.

Two individuals sought and were granted leave to intervene. The case was submitted to the Court on the pleadings, stipulated facts, and certain affidavits and documentary evidence.

The District Court filed its opinion on January 19th, 1990 holding that Article XII section 8 of the Nebraska Constitution was valid and enforceable and entered judgment for the defendant.

The plaintiff filed Notice of Appeal on February 16th, 1990 within the time provided by 28 U.S.C. § 2107 to the Eighth Circuit Court of Appeals.

The Eighth Circuit filed its opinion of February 27, 1991 holding that the district court properly applied the test in evaluating the constitutionality of Article XII section 8 of the Nebraska Constitution, and affirmed the district court judgment.

The plaintiff filed this Writ of Certiorari within the time provided for by 28 U.S.C. § 2101 (c).

REASONS FOR GRANTING PETITION

> The patrimony of the poor man lies in the strength and dexterity of his own hands, and to hinder his employing this strength and dexterity

> in what manner he thinks proper, without injury to his neighbor, is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberty both of the workman and of those who might be disposed to employ him. As it hinders the one from working at what he thinks proper, so it hinders the others from employing whom they think proper.[1]

This case, without any exaggeration intended, will quite literally decide the future of agriculture in America with respect to who may or may not be a farmer and who may or may not engage in farming in these United States. For that reason, the Attorney Generals of key agricultural states have entered the case.

This court's decision on whether to grant Certiorari in this case will in fact determine who will and who will not be allowed to engage in a business that has traditionally been open to every man, woman and child in America without restriction – namely, AGRICULTURE.

The court of appeals held that Article XII section 8 served a legitimate state interest and the means used to serve that interest was rationally related. As a result citizens of the same state as well as citizens of the several states of this country are treated unequally under the laws of the state of Nebraska.

Because the Court of Appeals seriously misconstrued this Court's prior decisions on the issue of legitimate state interest and rational relationship, and because the

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[1] *Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746, 757 (1884); (Field, J., concurring) (quoting *Smith's Wealth of Nations*, Bk. I. Chap. 10.)

Appeals Court's error will have such far reaching effects on agriculture across the length and breadth of these United States, a review of the decision is essential.

A. THE COURT OF APPEALS ERRONEOUSLY FOUND THAT ARTICLE XII SECTION 8 OF THE NEBRASKA CONSTITUTION SERVES A LEGITIMATE STATE INTEREST.

Article XII section 8 of the Nebraska Constitution not only creates a classification of U.S. persons who are incapable of owning a certain class of real property within the boundaries of the State of Nebraska it proceeds even further and also forbids them from even engaging in the purely physical or mental acts of "farming or ranching". Thus, this initiative and its restrictive effects go far, far beyond the mere purchase and ownership of agricultural land and into the very acts individuals are allowed to do with respect to "farming and ranching".

The single most important factor to remember about Article XII section 8 is precisely that which the lower courts missed. Article XII section 8 is a restriction on all individuals, not corporations. It restricts the tools individuals may use to engage in the acts of farming or of owning farmland.

The corporate structure is a reasonable and necessary tool for individuals to use in order to join together in order to engage in business in the 20th and 21st centuries. Agriculture is a business and Article XII section 8 says this necessary tool can only be used if you use it in conjunction with relatives. That is somewhat like the now fallen Berlin wall. During its 40 years of existence only 81

individuals were killed trying to get over or around the wall. But, during that same 40 years, another twenty million people were kept in check and in line because of the wall's very existence. Twenty million who did not attempt to escape or go over the wall because of the threat the wall posed.

The skillful lawyer may well find loopholes to get around Article XII section 8 for a few who dare to attempt it. True enforcement itself is an impossible goal, but the millions who will never attempt to engage in farming or owning farm land because of the very existence of Article XII section 8 is frightening for the future agricultural economy of America. Article XII section 8 simply says to all who would enter farming, "Unless you are kinfolk, don't team up with any other individual(s) to try and get involved in agriculture".

It is hard to conceive of a greater denial of equal protection on completely specious grounds than Article XII section 8 imposes on all individuals contemplating entering agriculture. One might just as well say, "Only redheads or people over six feet tall or people who happen to be born white are allowed to team up and use the corporate structure to engage in owning land or doing acts associated with farming and ranching".

That classification makes it illegal for a corporation to own farm or ranch land in the State of Nebraska unless certain criteria are met, one of which is a requirement of family relationship. The question presented is not confined to just what a state can do to a corporation, but to what extent a state can impair a U.S. citizen's right to transact business within the boundaries of the United

States. The cost of doing business in the farm and ranch sector is enormous. Article XII section 8 does not just restrict the manner of ownership. It effectively causes exactly what it is claimed to prevent. Article XII section 8 doesn't prevent the demise of the "typical" family farm. Considering the cost of ownership of farm and ranch land, Article XII section 8 creates a system in which only select and privileged families are allowed the protection of certain Nebraska laws. As Justice Bradley observed in *Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746 (1884) — "If it is not a denial of the equal protection of the laws to grant to one man, or set of men, the privilege of following an ordinary calling in a large community, and to deny it to all others, it is difficult to understand what would come within the constitutional prohibition." *Id.* at 766.

The protection of corporate law in relation to the occupation of farming and ranching in the State of Nebraska has been limited to only those individuals which maintain the majority of the corporate voting stock within the immediate family and further requires the physical presence of a family member either on the property or involved in the day to day labor. While licenses are properly required when persons pursue certain professions and avocations which require peculiar skills or supervision for the public health and welfare, such is not the case here. "The profession or avocation is open to all alike who will prepare themselves with the requisite qualifications or give the requisite security for preserving public order:" *Id.* at 763. The pursuit of an occupation of farming or ranching does not entail such requisite training. If that were the case, we would demand that all

farmers have advanced degrees in agronomy, chemistry and environmental protection.

The facts of this case clearly show the inequality and denial of the equal protection of the laws. The appellants in the case at bar only own about 10 acres and are not what one could classify as a huge corporation out to monopolize the agricultural community. Yet under the existing law, one particular family can own hundreds of thousands of acres, and its members can freely engage in the act of farming and ranching, even if the family corporation is a large national food production chain. For example: Tyson Foods and Cargill with their MULTI-BILLION dollar operations are legal, family owned corporations under Article XII section 8, but the two petitioners in the case at bar who joined together to own ten acres are illegal because they are not family related. Ridiculous. Absurd. Unconstitutional? The answer is clearly that this type of treatment is unconstitutional.

Article XII section 8 does not prevent the creation of enormous farms and ranches under the control of a select few. In fact it does just the opposite to a much greater degree. The select few allowed to be involved in agriculture are even fewer because of the necessary family ties.

Due to the economies of scale there is a point at which small family farms and medium family farmers are incapable of sustaining their livelihood and at the same time prevents them from participating in what has become one of the major financing means available to all industry. That financing is the creation of a corporation in order to sell off pieces of the corporation in the form of stock so that the capital can be raised to create and/or

operate a business. To restrict a corporation in the manner which Article XII section 8 does is clearly violative of the rights guaranteed by the Fourteenth Amendment to the United States Constitution.

The Article XII section 8 Constitutional restrictions on corporations are really restrictions upon all individuals. This is the subtle nuance that obviously the lower courts have missed. Thus, two individuals who want to avail themselves of the corporate laws of the State of Nebraska (or any other state) to join together and engage in farming or ranching are prohibited from doing so while two other individuals who have the proper family relationship are allowed to utilize the corporate laws of the state.

It is individuals, every single individual in Nebraska or the United States for that matter, who are most impacted by Article XII section 8. Why? Because the individuals are only allowed to use corporate laws if those individuals have the proper accident of birth and are properly related to each other. How much more clearly can an Equal Protection violation be demonstrated? An accident of birth is to determine who can join together and engage in farmland ownership and engage in acts, mental and physical, associated with farming and ranching.

There simply is no rational basis that can be formulated to show that Tom Jones and Harry Smith, two farmers who are not related, are denied the right to use the corporate structure to engage in agriculture while allowing Tom Jones and his first cousin Harry Smith to use the same corporate structure merely because of an

accident of birth. To state that the reason is to maintain the family farm is to ignore the facts that through the years the typical farm has grown from the initial 160 acres to huge farms and ranches that utilize thousands and thousands of acres. There has been no showing that a corporation such as the one in the case at bar is more of a threat to the farming and ranching industry than the family corporation that owns thousands of acres. There is no rational basis to assume that the family member on the family farm or ranch is going to be more environmentally conscious than the manager who is hired to make sure that the corporation makes a profit. Each is extremely concerned with maintaining a livelihood and a profit margin.

This panacea of outlawing unrelated individuals from using the corporate structure is spreading throughout the agricultural states. Nebraska, however, is the most restrictive model in the United States and is the only state to put such restrictions directly into its Constitution.

The following states, Iowa, Kansas, Minnesota, Missouri and South Dakota, have enacted similar restriction on the ownership of land.

Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 81 L.Ed. 2d 186, 104 S.Ct. 2321 (1984) held that the prevention of the collection of a majority of real property in the hands of a select few was a legitimate state purpose. However, *Midkiff* has no relationship or bearing on the case at bar. Why? *Midkiff* dealt specifically with the need to involve the government authority in the process of redistributing land for the public welfare of the people and to prevent the concentration of land in the hands of a

select few. The case at bar is, if anything, exactly the opposite. The case at bar seeks to outlaw restrictive laws which concentrate the land in the hands of a few.

The case at bar does not prevent or redistribute land held in the hands of a select few. On the contrary this type of legislation is specifically designed to cause what *Midkiff* held to be against the public interest. Any rationally thinking person realizes that when you prohibit one group of individuals from participating in an occupation you automatically have reduced the number of potential purchasers and participants to a lesser number; thus creating a class of select persons who may participate in the ownership of land. Exactly the result the State of Hawaii was attempting to remedy in *Midkiff*.

Article XII section 8 does not guarantee a wide range of potential farmers and ranchers but rather creates strict limitations on the people who may own the land and engage in the acts of farming and/or ranching. This type of legislation is directly contrary to the Fourteenth Amendment.

A.1 A rational relationship requires more than a belief that the means will work.

Legitimate state interest, rational relationship. This standard of review is anything but clear. It has been thought by many as being nothing more than another way of saying government wins, citizen loses. However, the definition of rational requires at a minimum some logical and unbiased belief that the means used to achieve a certain result is related to some degree. It must require at least that when the problem is looked at in its

entirety that the means stands a better than average chance of accomplishing the task without creating separate privileged classes of people without good cause.

Because the constitutional amendment under consideration today was enacted via an initiative petition under depression like conditions in the farm belt and not by the legislature of the state, there is little legislative history describing the results that were desired. The ballot on which the voting public cast their vote stated that a vote "for will create a constitutional prohibition against further purchase of Nebraska farm and ranch lands by any corporation or syndicate other than a Nebraska family farm corporation". On the face of the ballot itself there is clearly a distinction being made that prevents certain people from obtaining equal protection of the laws of the state of Nebraska as well as the laws of the United States.

The lower courts both looked for a rational basis for the enactment of the amendment and arrived at the statement that "[t]hat voters reasonably could have believed that by enacting the initiative in question they would be promoting family farm operations by preventing non-family corporate ownership of farmland." (App.7). Petitioner contends that more is needed than a reasonable belief that the amendment will do what is intended. The mere fact that a reasonable belief existed does not stop one from asking if that reasonableness is tainted by illogic and bias that have no place in the enactment of legislation that affects the ability of people to pursue an occupation of their choice. Imagine such laws being implemented in the food, chemical, grocery, insurance or banking industries. Allowing the use and protection of the corporate laws to only a select few runs contrary to the purposes of our entire thoughts and beliefs as to what equal justice actually is.

B. THE COURT OF APPEALS ERRONEOUSLY REFUSED TO CONSIDER PETITIONERS' DUE PROCESS ARGUMENT.

The court of appeals refused to "pass upon questions which have not been raised and decided by the court below." (App.9). The appeals court reasoned that because the due process argument in the district court was cast differently, it would not consider the argument presented to them.

The argument at the district court level attacked the amendment under the due process clause generally. On appeal the due process argument focused on one particular provision of the amendment that allowed the taking of the property by the state without any procedures for compensation.

The simple fact that the argument was narrower at the appeals level does not prevent the court from deciding the issue. The appeals court in defining its reasons for not considering the argument was that this particular provision had not been applied to MSM. The problem with this reasoning is that it misconstrues the standing of the petitioner. In questions of standing the "plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as a result of the challenged official conduct and the injury or threat must be both 'real and immediate,' not 'conjectural or hypothetical' *"City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). Applying this criteria to the facts at bar shows that the threat of direct injury is immediate. The instant the amendment is

upheld, the petitioner is required by law to divest themselves of the property or watch the state take the property from them without compensation. There is no problem of immediacy here. The day after this opinion is handed down the owners are threatened with divestiture or escheatment to the state. There is no procedure for compensation and no requirement in the amendment to force the state to sell the property or to use its best efforts to obtain the best price for the property.

B.1 The taking of the property by the state is unconstitutional on its face.

Article XII section 8 provides for the property, if not divested within a limited time frame, to escheat to the state without the payment of any compensation. To allow for real estate to escheat to the State without the showing of a public purpose and the providing of just compensation is in direct conflict with the U.S. Constitution as it applies to the states through the Fourteenth Amendment.

As this court noted in *Rice v. Sioux City Memorial Park Cemetery, Inc., et al,* 725 S.Ct. 614, 349 U.S. 70 (1955) special and important reasons imply a reach to a problem beyond the academic or episodic. The fact pattern involved here is anything but academic or episodic. As shown by the Amici briefs filed in the lower court, this type of legislation has been enacted in more than just one state and its effects reach directly to the entire American agricultural economy. It has long been standard policy in this country that agricultural policy is set by the federal government because of its importance to the nation as a whole and not just the individual states. To allow the

states to affect the long term goals of the federal government's policy by prohibiting certain U.S. citizens from participating in the ownership of farm and ranch land is a policy decision that has no place in the state forum.

Because of the uniqueness and the importance of the questions presented this Court should settle this litigation.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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May 23, 1991

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 90-1300

MSM Farms, Inc., a Nebraska corporation, Appellant, v. Robert M. Spire, Attorney General for the State of Nebraska in his official capacity, Appellee, Everett Holstein and Richard Bartek, Intervenors Below, Appellees.	* * *

In 1982, Nebraska voters adopted article XII section 8 of the Nebraska Constitution through Nebraska's initiative and referendum process. The objective of the initiative was to prohibit non-family farm corporations from owning and operating Nebraska farm and ranch land. In 1988, plaintiff MSM Farms, a Nebraska corporation with unrelated shareholders, sought a declaration that article XII section 8 violates the equal protection and due process clauses of the fourteenth amendment of the United States Constitution. The district court[1] upheld the law. We affirm.

I. EQUAL PROTECTION

The equal protection clause of the fourteenth amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. A corporation such as MSM Farms is a "person" under the equal protection clause. *Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181, 189 (1888). MSM argues article XII section 8 of the Nebraska Constitution denies it equal protection because the law's prohibition of non-family corporate farming is not rationally related to achieving any legitimate state purpose.

We begin our analysis with the presumption that the law, which involves no suspect classifications or fundamental rights, is constitutional. *See Kadrmas v. Dickson Public Schools*, 487 U.S. 450, 462 (1988); *New Orleans v.*

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[1] The Honorable Warren K. Urbom, United States District Judge for the District of Nebraska.

Dukes, 427 U.S. 297, 303 (1976). Social and economic measures, like the corporate farming prohibition in this case, run afoul of the equal protection clause only when "the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." *Kadrmas*, 487 U.S. at 463 (citing *Vance v. Bradley*, 440 U.S. 93, 97 (1979)).

> States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude. . . . [I]n the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment.

Dukes, 427 U.S. at 303-04.

In determining whether the people of Nebraska acted in a wholly arbitrary or irrational way in adopting the constitutional provision MSM has challenged, we look first to whether a legitimate state purpose exists for the law voters approved. Because the law was adopted through the initiative and referendum process,[2] there is little traditional legislative history regarding its purpose. *See Omaha National Bank v. Spire*, 223 Neb. 209, 389 N.W.2d 269, 279 (1986). *Cf. Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 465, 467, 468, 470 (1981) (citing legislative debates). Noting that the Nebraska law is similar to the statutory provisions adopted by eight other

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[2] For an explanation of this process, see *Omaha National Bank v. Spire*, 223 Neb. 209, 389 N.W.2d 269, 273-74 (1986).

midwestern states, amici[3] contend Nebraska's objectives are similar to those explicitly set forth in the legislation of these other states.[4] Amici cite as an example Minn. Stat. § 500.24(1), which states that

> it is in the interests of the state to encourage and protect the family farm as a basic economic unit, to insure it as the most socially desirable mode of agricultural production, and to enhance and promote the stability and well-being of rural society . . . and the nuclear family.

Minn. Stat. § 500.24(1). *See also* S.D. Codified Laws Ann. § 47-9A-1.

Defendant-intervenors Everett Holstein and Richard Bartek, Nebraska farmers for over twenty years and supporters of the initiative, contend that the Nebraska law was intended to address the social and economic evils supporters perceived as related to corporate farming. According to evidence presented by defendant-intervenors, supporters of the Nebraska initiative believed that a rise in corporate farming in Nebraska would lead to the decline of the family farmer, who would be unable to compete fairly with the ability of corporations to raise capital and benefit from the tax laws. Supporters further maintained that corporate farming would lead to

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[3] Both the State of North Dakota and the State of Iowa filed amicus curiae briefs in this case.

[4] *See* Iowa Code §§ 172C.1-.15; Kansas Stat. Ann. §§ 17-5902 to 5904; Minn. Stat. § 500.24; Mo. Ann. Stat. §§ 350.010-.030; N.D. Cent. Code §§ 10-06-01 to -15; Oklahoma Stat. tit. 18 §§ 951-56; S.D. Codified Laws Ann. §§ 47-9A-1 to -23; and Wis. Stat. § 182.001.

absentee landowners and tenant operation of farms, would adversely affect the rural social and economic structure, and would result in decreased stewardship and preservation of soil, water, and other natural resources. *See generally* Affidavit of George William Burrows, J.A. 267-274; Affidavit of Neil Oxton, J.A. 285-292; Affidavit of Martin Douglas Strange, J.A. 326-328, and attached studies prepared by the Center for Rural Affairs, J.A. 329-438.

Defendant-intervenors presented reports prepared by the Agricultural Extension Services of the North Central Region[5] which reflect this country's historical reliance on family or dispersed farm ownership. *See* University of Illinois at Urbana-Champaign College of Agriculture Cooperative Extension Service, Special Publications 27 & 28, "Who Will Control U.S. Agriculture?" J.A. 196-232. These reports suggest that not only would family farmers find their situation vastly changed if concentrated or corporate farming were to prevail throughout the country, but that firms supplying the farmer/producer, firms marketing and processing farm products, rural communities, and consumers would also be affected. *See, e.g., id.*, Special Publication 27 at 16-17, J.A. 220-221.

In determining the purpose of the Nebraska initiative prohibiting non-family corporate farming, the district court turned to the language of the initiative petition

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[5] The North Central Region includes the Agricultural Extension Services of Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, and Wisconsin, acting in cooperation with the U.S. Department of Agriculture.

itself. The court concluded that Nebraska voters sought to retain and promote family farm operations in Nebraska and sought to prevent a perceived threat that would stem from unrestricted corporate ownership of Nebraska farm land by preventing the concentration of farmland in the hands of non-family corporations. We agree with the district court that such a policy represents a legitimate state interest under the equal protection clause. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 245 (1984); *Asbury Hospital v. Cass County*, 326 U.S. 207, 214-15 (1945). *See State ex rel. Webster v. Lehndorff Geneva, Inc.*, 744 S.W.2d 801, 806 (Mo. 1988); *Omaha National Bank*, 389 N.W.2d at 282-83.

MSM nonetheless maintains that Nebraska's prohibition of non-family farm corporations must be struck down because the classifications created by the law are not rationally related to achieving the purpose of preserving the family farm. MSM contends the law is arbitrary because it does nothing to prevent the concentration of ownership of farm lands in corporations owned or controlled by families. MSM further contends the law is irrational because there were only a small percentage of corporate farms in Nebraska at the time voters approved the initiative restricting corporate ownership of farm and ranch land.

MSM misapprehends the nature of our inquiry under the equal protection clause. It is up to the people of the State of Nebraska, not the courts, to weigh the evidence and decide on the wisdom and utility of measures adopted through the initiative and referendum process. *See Clover Leaf Creamery*, 449 U.S. at 469. Whether *in fact* the law will meet its objectives is not the question: the

equal protection clause is satisfied if the people of Nebraska could rationally have decided that prohibiting non-family farm corporations might protect an agriculture where families own and work the land. *Id.* at 466; *Hawaii Housing Authority*, 467 U.S. at 242. *See Kadrmas*, 487 U.S. at 463.

We agree with the district court that voters reasonably could have believed that by enacting the initiative in question they would be promoting family farm operations by preventing non-family corporate ownership of farmland. The district court properly observed that MSM's statistics on the percentage of non-family corporate farms in Nebraska shed little light on the question of whether family farming will be benefitted by excluding non-family corporate ownership of farm lands in the future. The reports presented by defendant-intervenors describe a trend toward larger and fewer farms, and state that "[i]f nothing is done now to arrest the forces already in motion, commercial agriculture will likely be increasingly concentrated in larger, more industrialized units." Special Report 28, Leaflet 3, J.A. at 211. Voters could reasonably believe that their initiative would help to curb this trend.

MSM's complaint that the law permits family corporations to continue farming is equally unavailing. As amici effectively point out, the law provides an exception for family-owned and controlled corporations only where a family member resides on the farm or is actively engaged in the day to day labor and management of the farm. Defendant-intervenors contend that MSM as a corporation embodies many of the problems traditional family farmers perceive in corporate farming: neither of its

two incorporators live on or near the tract of farmland MSM purchased in 1988, one had never been to see the land at all, and the other had only limited knowledge of its location and characteristics.

In upholding a state statute which required an applicant for a pharmacy permit to be either a registered pharmacist or a corporation in which the majority of the stock was owned by registered pharmacists, the Supreme Court observed:

> A standing criticism of the use of corporations in business is that it causes such business to be owned by people who do not know anything about it. Argument has not been supposed to be necessary in order to show that the divorce between the power of control and knowledge is an evil. . . . The Constitution does not make it a condition of preventive legislation that it should work a perfect cure. It is enough if the questioned act has a manifest tendency to cure or at least to make the evil less.

North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156, 166-67 (1973) (quoting *Liggett Co. v. Baldridge*, 278 U.S. 105, 114-15 (1928) (Holmes, J., dissenting).

We have little difficulty concluding, based on all of the above, that MSM has failed to carry its "heavy burden" of showing that Nebraska's prohibition on non-family corporate farm ownership is arbitrary and irrational. *See Kadrmas*, 487 U.S. at 463.

II. DUE PROCESS

The district court rejected MSM's due process clause challenge for the same reasons it found MSM's equal protection claim lacking. *See Clover Leaf Creamery*, 449 U.S. at 470 n.12. MSM now casts its due process argument differently, contending on appeal that article XII section 8 offends the due process clause because it contains a provision requiring corporation owners of farm and ranch land to divest themselves of such land within two years after the state has obtained a court order requiring divestment.[6]

We generally do not pass upon questions which have not been raised and decided by the court below, *Morrow v. Greyhound Lines, Inc.*, 541 F.2d 713, 724 (8th Cir. 1976), and we find no persuasive reason for doing so here, particularly when the issue which has been presented for

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[6] Article XII, section 8 provides in this regard that:

> The Secretary of State shall monitor corporate and syndicate agricultural land purchases and corporate and syndicate farming and ranching operations, and notify the Attorney General of any possible violations. If the Attorney General has reason to believe that a corporation or syndicate is violating this amendment, he or she shall commence an action in district court to enjoin any pending illegal land purchase, or livestock operation, or to force divestiture of land held in violation of this amendment. The court shall order any land held in violation of this amendment to be divested within two years. If land so ordered by the court has not been divested within two years, the court shall declare the land escheated to the State of Nebraska.

the first time on appeal involves the constitutionality of a provision which has not yet been applied to MSM. *See Asbury Hospital,* 326 U.S. at 213-14; *Omaha National Bank,* 389 N.W.2d at 284. We note, however, that MSM purchased its farm land well after voters had adopted the corporate farming prohibition,[7] and that under such circumstances a court might be hard-pressed to find that MSM had not been "afforded a fair opportunity to realize the value of the land" if divestiture is subsequently ordered. *Asbury Hospital,* 326 U.S. at 212.

III. CONCLUSION

The people of Nebraska have made a reasonable judgment that prohibiting non-family corporation farming serves the public interest in preserving an agriculture where families own and farm the land. It is not for the courts to second-guess the wisdom of this judgment. The equal protection clause is satisfied if the law adopted through the initiative process is rationally related to a legitimate state interest. The district court properly applied this test in evaluating the constitutionality of article XII, section 8 of the Nebraska Constitution, and its judgment upholding the law is hereby affirmed.

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[7] In fact, the law contains an exception for corporations which were engaged in farming or ranching operations on November 29, 1982, the effective date of the initiative. *See* Neb. Const. art. XII, § 8; *Omaha National Bank,* 389 N.W.2d at 283.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

MSM FARMS, INC., a Nebraska Corporation,	)	CV88-L-229
Plaintiff,	)	
vs.	)	MEMORANDUM
ROBERT M. SPIRE, Attorney General for the State of Nebraska in his official capacity,	)	OF DECISION
Defendant.	)	FILED JAN 19 1990
and	)	
EVERETT HOLSTEIN and RICHARD BARTEK,	)	
Defendants-Intervenors.	)	

The plaintiff, MSM Farms, Inc., is a duly organized and existing Nebraska corporation. The defendant, Robert M. Spire, is the Attorney General for the State of Nebraska and is sued in his official capacity. The plaintiff seeks preliminary and permanent injunctive relief to restrain the defendant and his office from enforcing the provisions of Article XII, Section 8 (Sec. 8) of the Nebraska Constitution which restricts corporate ownership of real estate used for farming or ranching. Plaintiff also requests declaratory relief on the basis that Sec. 8 violates the equal protection and due process clauses of the Fourteenth Amendment to the U.S. Constitution. This court has jurisdiction based upon 28 U.S.C. 1331 (federal question), 28 U.S.C. 2201 (declaratory judgment), and the Fourteenth Amendment. The defendant-intervenors are

two Nebraska farmers who wish to defend the constitutionality of Sec. 8.

FACTS

The plaintiff is a for-profit corporation first incorporated in 1987. There are 3,000 outstanding shares of stock, 1500 of which are owned by Paul Meyer, the president of the corporation, and 1500 that are owned by Gerald Schleich, the vice-president, secretary and treasurer of the corporation. The plaintiff is the record title owner of 10.11 acres of real estate located in Platte County, Nebraska, which it acquired on April 4, 1988. It also owns certain livestock purchased for breeding purposes. The aforementioned real estate was used for grazing during the 1988 grazing season, and MSM Farms intends to continue to graze its livestock upon the real estate. Neither of the two shareholders, nor either of their spouses, is related to the other shareholder or a spouse of the other shareholder within the fourth degree of kindred as required by Section 8. The plaintiff and the defendant have stipulated that the plaintiff is not and has not been since the date of its incorporation a family farm or ranch corporation within the meaning of subdivision (A) of Sec. 8, and have further stipulated that the plaintiff's ownership of the above described real estate is in violation of Sec. 8. Filing 12.

EQUAL PROTECTION

The plaintiff contends that Sec. 8 violates the equal protection clause of the Fourteenth Amendment because it impermissibly discriminates between corporations in

which the majority of voting stock is held by members of one family within the fourth degree of kindred and corporations which do not meet this requirement. I disagree and find no equal protection violation.

Although no precise formula has been developed, the Supreme Court has held that the Fourteenth Amendment allows the States a wide scope of discretion in enacting laws which affect some groups of citizens differently from others. *McGowan v. Maryland,* 366 U.S. 420, 425 (1961).

> The Constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. *A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.* (Emphasis supplied)

McGowan v. Maryland, supra at 425-426.

The actions of an electorate in exercising its initiatory powers should be presumed constitutional as if it were an action of the legislature. *Felix v. Milliken,* 463 F.Supp 1360, 1375 (E.D. Mich., 1978)

When a local economic regulation is challenged solely on equal protection grounds, the Supreme Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. *New Orleans v. Dukes,* 427 U.S. 297 (1976). Unless the classification infringes on a fundamental personal right or is drawn upon inherently suspect distinctions such as race, religion or alienage, the constitutionality of a statutory

discrimination is presumed and requires only that the classification challenged be rationally related to a legitimate state interest. *New Orleans v. Dukes, supra* at 303.

The plaintiff does not contend, and rightly so, that corporations are a suspect class or that corporate ownership of farm or ranch land is a fundamental personal right. The analysis must be whether the classification made in Sec. 8 between family and non-family corporations is rationally related to a legitimate state purpose. To determine if a challenged classification is rationally related to the achievement of a legitimate state interest, two questions must be answered: (1) Does the challenged legislation have a legitimate purpose? and (2) Was it reasonable for lawmakers to believe that use of the challenged classification would promote that purpose? *Western & Southern Life Ins. Co. v. Board of Equalization,* 451 U.S. 648 (1981) In the present case we are interpreting amendments to the Constitution and voters rather than legislation and lawmakers, but I believe the same questions need be answered.

(1) Existence of a legitimate purpose.

To review a state statute or constitutional provision under the equal protection clause a decision needs to be made as to whether the provision rationally furthers *any* legitimate state objective. It is constitutionally irrelevant whether this reasoning in fact underlay the legislative decision. The court may even hypothesize the motivations of the state legislature to find a legitimate objective promoted by the provision under attack. *Malmed v. Thornburgh,* 621 F.2d 565, 569 (3rd Cir. 1980). Other courts have

addressed this issue when pertaining to initiative amendments. In *Felix v. Milliken,* 463 F.Supp. 1360 (E.D. Mich. S.D. 1978) plaintiffs challenged a constitutional amendment passed by the voters that raised the legal drinking age from age 19 to age 21 on equal protection grounds. The parties were in dispute as to the purpose on which the court should focus in determining whether a rational relationship existed. The plaintiffs argued that the court should look only to the purpose articulated by the proponents in the campaign to win passage. The State argued that the court was not bound to look only to the articulated purpose, but in the area of liquor regulations should also look to other rational bases that my be apparent from the classification. The court agreed with the State and held that it knew of "no case in which the Supreme Court has held that the Court can only look to the specified articulated purpose particularly when dealing with non-suspect classifications and other than fundamental rights." *Felix, supra* at 1377. Another court has held that election brochure arguments are properly considered as legislative history in construing the purpose of a constitutional amendment adopted by popular vote. *Chico Feminist Women's Health Center v. Butte Glenn Medical Soc'y,* 557 F. Supp. 1190 (E.D. Calif. 1983).

The petition for Initiative 300 stated that "The object of this initiative petition is to prohibit non-family farm corporations from further purchase of Nebraska farm and ranch land, and to prohibit further establishment of non-family corporate crop and livestock operations." Filing 25. I can infer from this statement that by enacting Initiative 300 the voters sought to retain and promote family farm operations in Nebraska and sought to prevent a

perceived threat that would stem from unrestricted corporate ownership of Nebraska farm land by preventing the concentration of farm land in the hands of non-family corporations. The Supreme Court has previously found that a state policy against the concentration of corporate-owned farming lands is a proper legislative objective. *Asbury Hospital v. Cass County,* 326 U.S. 207, 214 (1945). I find that the objective here is likewise a valid one.

(2) Does the classification promote the purpose?

The next question is whether it was reasonable for voters to believe that by enacting Initiative 300 they would be promoting family farm operations by preventing non-family corporate ownership of farm land. Statutory discrimination between different classes is presumed to be relevant to a permissible legislative purpose and will not be deemed a denial of equal protection if any state of facts can be conceived to support it. *Asbury Hospital, supra* at 215. The plaintiff is required to convince the court that the legislative purpose on which the amendment's classifications are based could not reasonably be conceived to be true by the governmental decision-maker, in this case the voters. *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456 (1981). Although the plaintiff may introduce evidence supporting a claim that there is no rational connection between the amendment and its objective, they cannot prevail so long as the question is at least debatable. If the question is at least debatable, a court cannot substitute its judgment for the voters on the wisdom and utility of the amendment. *Id.* at 464, 469.

The evidence presented to me does not indicate that a rational relationship cannot reasonably be conceived to exist between the prohibition against non-family corporate ownership of farm land and the preservation of the traditional family farm. Whether a rational relationship exists is at least debatable. I base this decision on the three documents that the plaintiff has provided: A 1982 Census of Agriculture (United States and Nebraska), a report to Congress entitled "Farm Organization and Performance in the 1970's," prepared by the Economic Research Service, U.S. Department of Agriculture, and a report by the Agricultural Research Division at the University of Nebraska-Lincoln entitled "Corporate Farming and Corporate Farming Restrictions in Nebraska." The Defendant-Intervenors have objected to portions of the UN-L document on the basis that they are irrelevant and contain hearsay. Filing 23. I will sustain the objections to the third and fourth paragraphs of page 51 and the first five paragraphs of page 52. As to pages 22 to 44, I conclude that the information contained therein is both hearsay and irrelevant to the issue of whether a rational relationship could conceivably been thought to exist between the amendment and the objective. As to the unobjected portions of the document, it provides no data to support the plaintiff's position. The only relevant information I can locate is the finding that less than one percent of Nebraska farms are owned by non-family corporations. This does not support plaintiff's assertion that family farming will not be benefited by excluding non-family corporate ownership of farm lands in the future. Likewise, a review of the Census Report and the Report to Congress states only that the number of non-family

corporations has not greatly changed in the eight years prior to 1982. (U.S. Census Report, p. 81, Nebraska Census Report, p. 4, Report to Congress, p. 16) I can find nothing which supports the plaintiff's position that no rational connection exists. That being the case, I find that the plaintiff's equal protection claim is without merit and that the amendment survives constitutional scrutiny under the equal protection clause.

Before moving on to the next issue I think I should address the plaintiff's reliance on *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973) to support its contention that Sec. 8 improperly creates a classification based solely upon family relationships. It is true that the *Moreno* court held a provision of the Food Stamp Act to be in violation of the equal protection clause because it impermissibly distinguished between households whose members were related to one another as compared to households containing one or more members unrelated to the rest. The court based its decision on the fact that the classification had no rational relationship to the objectives sought to be furthered by the government, not because it is impermissible to create classifications based upon family relationships. In the present case a rational reason does exist for the differentiation and I find plaintiff's reliance on *Moreno* unpersuasive.

DUE PROCESS

The Plaintiff also claims that Sec. 8 is violative of the Due Process clause of the Fourteenth Amendment. The requirements of due process, in the absence of other

constitutional restriction, permit a state to adopt whatever economic policy may reasonably be deemed to promote public welfare and to promote that policy by legislation adapted to its purpose. If the law passed has a reasonable relation to a proper legislative purpose, and is neither arbitrary nor discriminatory, the requirement of due process is satisfied. *Nebbia v. New York*, 291 U.S. 502 (1934). The Court has refused to sit as a superlegislature to weigh the wisdom of legislation and has refused to go back to the time when courts used the due process clause to strike down state laws which regulated business and industrial conditions because they may have been unwise or improvident. *Ferguson v. Skrupa*, 372 U.S. 726. I find that Sec. 8 does not violate the due process clause.

Dated January 19, 1990.

BY THE COURT

/s/ Warren K. Urbom
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

MSM FARMS, INC., a Nebraska Corporation, Plaintiff, vs. ROBERT M. SPIRE, Attorney General for the State of Nebraska in his official capacity, Defendant. and EVERETT HOLSTEIN and RICHARD BARTEK, Defendants-Intervenors.	)	CV88-L-229 JUDGMENT FILED JAN 19 1990

In accordance with today's memorandum of decision,

IT IS ORDERED that judgment is entered for the defendant.

Dated January ___, 1990.

BY THE COURT

/s/ Warren K. Urbom
United States District Judge